SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88826; File No. S7–24–89]

Joint Industry Plan; Order Approving the Forty-Seventh Amendment to the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges, as Modified by the Commission, Concerning a Confidentiality Policy

May 6, 2020.

I. Introduction

On November 25, 2019,[1] the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis (''Nasdaq/UTP Plan'' or ''Plan'') participants (''Participants'')[2] filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') pursuant to Section 11A of the Securities Exchange Act of 1934 (''Act'')[3] and Rule 608 of Regulation National Market System (''NMS'') thereunder,[4] a proposal to amend the Nasdaq/UTP Plan.[5] The amendment represents the Forty-Seventh Amendment to the Plan (''Amendment''). As described in the Amendment, the Participants proposed to adopt a confidentiality policy to provide guidelines for the Operating Committee and the Advisory Committee of the Plan, and all subcommittees thereof, regarding the confidentiality of any data or information generated, accessed, or transmitted to the Operating Committee, as well as discussions occurring at a meeting of the Operating Committee or any subcommittee. The Amendment was published for comment in the **Federal Register** on January 14, 2020.[6]

In the Commission's view, the Amendment must balance protection against the potential misuse of confidential information with the strong interest in public transparency about the operations of the Plan in light of the important function the Plan serves in the national market system. This order approves the Amendment to the Plan, as modified by the Commission, to better strike that balance. A copy of the Amendment, as modified by the Commission, is attached as *Exhibit A* hereto. The Commission concludes that the Amendment, as modified, is appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanism of a national market system, or is otherwise in furtherance of the purposes of the Act.[7]

II. Description of the Proposal

According to the Participants, the confidentiality policy is designed broadly to (i) protect against any potential misuse of confidential information, which includes, but is not limited to, protecting confidential information obtained or generated by the Administrator and Processor in connection with the operation of the securities information processor (''SIP'') operated pursuant to the Plan; as well as (ii) to allow the Operating Committee to disclose confidential information to the Advisory Committee to obtain its input without concern that such confidential information may be shared beyond the Advisory Committee.[8]

Among other things, the Participants believe that the proposed Amendment will allow for more sharing of information with the Advisory Committee regarding the operation of the Plan and elicit more input by the Advisory Committee on Plan matters that might otherwise be deemed confidential.[9] By sharing information that would in the ordinary course be considered appropriate for confidential treatment, the Participants believe that the Advisory Committee will be able to provide more informed advice and recommendations with respect to the operation and governance of the Plan.[10]

A. Proposed Confidentiality Policy

The confidentiality policy proposed by the Participants applies to all representatives of the Participants, Pending Participants, the Nasdaq/UTP Administrator and Processor, and the Advisory Committee. Additionally, it applies to agents of the Operating Committee, including, but not limited to, attorneys, advisors, accountants, contractors or subcontractors, as well as any third parties invited to attend meetings of the Operating Committee or Plan subcommittees. These persons are collectively defined in the confidentiality policy as ''Covered Persons.''[11]

The policy establishes guidelines and procedures for (i) identifying and categorizing types of confidential information, (ii) providing increasing degrees of protection for more sensitive types of confidential information, and (iii) setting forth the circumstances in which disclosure of confidential information may be authorized. The proposed confidentiality policy creates three categories of confidential information: (1) Restricted Information;[12] (2) Highly Confidential Information;[13] and (3) Confidential

[1] *See* Letter from Robert Books, Chairman, Operating Committee, Nasdaq/UTP Plan, to Vanessa Countryman, Secretary, Commission, dated November 19, 2019 (''Transmittal Letter'').

[2] The Participants are the national securities association and national securities exchanges that submit trades and quotes to the Plan and include: Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe Exchange, Inc., Financial Industry Regulatory Authority, Inc., The Investors Exchange LLC, Long-Term Stock Exchange, Inc., Nasdaq BX, Inc., Nasdaq ISE, LLC, Nasdaq PHLX, Inc., The Nasdaq Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc. (each a ''Participant'' and collectively, the ''Participants''). Participants also are members of the Plan's Operating Committees. Other parties include the ''Processor,'' who is charged with collecting, processing and preparing for distribution or publication all Plan information. The ''Administrator'' is charged with administering the Plan to include data feed approval, customer communications, contract management, and related functions. The ''Advisory Committee members'' are individuals who represent particular types of financial services firms or actors in the securities market, and who were selected by Plan participants to be on the Advisory Committee. A list of the Processor, Administrator, and Advisory Committee members is available at *http://www.utpplan.com/governance.*

[3] 15 U.S.C. 78k–1(a)(3).

[4] 17 CFR 242.608.

[5] The Plan governs the collection, processing, and dissemination on a consolidated basis of quotation information and transaction reports in Eligible Securities for its Participants. This consolidated information informs investors of the current quotation and recent trade prices of Nasdaq securities. It enables investors to ascertain from one data source the current prices in all the markets trading Nasdaq securities. The Plan serves as the required transaction reporting plan for its Participants, which is a prerequisite for their trading Eligible Securities. *See* Securities Exchange Act Release No. 55647 (April 19, 2007), 72 FR 20891 (April 26, 2007).

[6] *See* Securities Exchange Act Release No. 87910 (January 8, 2020), 85 FR 2212 (January 14, 2020) (''Notice''). Comments received in response to the Notice are available at *https://www.sec.gov/comments/s7-24-89/s72489.shtml.*

[7] 17 CFR 242.608(b)(2).

[8] *See* Notice, *supra* note 6, 85 FR at 2207. The Amendment also proposes to define the term ''Public Information'' and require that certain information be made publicly available. *See* Section 2(d) of the proposed policy.

[9] *See* Notice, *supra* note 6, 85 FR at 2213.

[10] *See id.* at 2214.

[11] As specifically set forth by the Participants under Section 1(b) of the proposed policy, Covered Persons would not include staff of the Commission.

[12] Restricted Information was defined by the Participants under Section 2(a) of the proposed policy as (i) highly sensitive customer-specific financial information, (ii) customer-specific audit information, (iii) other customer financial information, and (iv) ''Personal Identifiable Information.''

[13] Highly Confidential Information was defined by the Participants under Section 2(b) of the

Continued

Information.[14] The proposed confidentiality policy also defines the term ''Public Information.'' [15] The confidentiality policy outlines the procedures with respect to identifying documents as Restricted, Highly Confidential, or Confidential as well as the procedures regarding how to treat documents and information in each category. The confidentiality policy places the obligation on the Administrator and the Processor to be the custodians of all documents discussed by the Operating Committee and to maintain the classification of such documents.[16]

B. Procedures Governing Restricted Information

With respect to Restricted Information, to ensure the protection of customer identities and customer-related information, the proposed Amendment provides that such information will be disclosed only when necessary to conduct Plan-related business.[17] Specifically, Restricted Information will be kept in confidence by the Administrator and Processor and will not be disclosed to the Operating Committee or any subcommittee thereof, or during Executive Session,[18] or to the Advisory Committee except in limited circumstances.

C. Procedures Governing Highly Confidential Information

With respect to Highly Confidential Information, the proposed confidentiality policy provides that such information may be disclosed only in Executive Session of the Operating Committee or to the Legal Subcommittee. Highly Confidential Information also may be disclosed to SEC staff, unless it is protected by the Attorney-Client Privilege or the Work Product Doctrine.

In addition, the proposal allows a Covered Person that is a representative of a Participant to disclose Highly Confidential Information to other employees or agents of the Participant or to the Participant's affiliates as needed for such Covered Person to perform his or her function on behalf of the Participant, as reasonably determined by the Covered Person.[19]

Further, because of the heightened concerns regarding the disclosure of Highly Confidential Information, in the event a Covered Person is determined by a majority vote of the Operating Committee to have disclosed Highly Confidential Information, the proposal authorizes the Operating Committee to determine the appropriate remedy for the breach based on the facts and circumstances of the event.[20]

D. Procedures Governing Confidential Information

Under the proposed confidentiality policy, Confidential Information may be disclosed to the Operating Committee, any subcommittee thereof, and the Advisory Committee. A Covered Person may not disclose Confidential Information to any individual that is not either a Covered Person or a member of the SEC staff, except with authorization of the Operating Committee, or as may be otherwise required by law.[21]

Further, in order to elicit industry feedback, members of the Advisory Committee may be authorized by the Operating Committee to disclose particular Confidential Information to enable them to consult with third-party industry representatives or technical experts subject to certain restrictions.

As it does for Highly Confidential Information, the proposal allows a Covered Person that is a representative of a Participant to disclose Confidential Information to other employees or agents of the Participant or to the Participant's affiliates as needed for such Covered Person to perform his or her function on behalf of the Participant, as reasonably determined by the Covered Person.[22]

Finally, the proposal requires a Covered Person that discloses Confidential Information without the authorization of the Operating Committee to report such disclosure to the Chair of the Operating Committee, which will then be recorded in the minutes of the meeting of the Operating Committee.[23]

III. Discussion and Modifications by the Commission

Pursuant to Rule 608, the Commission shall approve the amendment, ''with such changes or subject to such conditions as the Commission may deem necessary or appropriate,'' if it finds that the amendment is ''necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act.'' [24] After carefully considering the comments received on the Amendment, the Commission is approving the Amendment, as modified by the Commission pursuant to Section 11A of the Act [25] and Rule 608 thereunder. The Commission believes the Plan should have a confidentiality policy, but believes that the modifications

proposed policy as (i) any data or information shared in an Executive Session or that would otherwise qualify for confidential treatment pursuant to the Plan's Executive Session Policy; and (ii) any other highly sensitive Participant-specific, customer-specific, individual-specific, or otherwise sensitive information relating to the Operating Committee, Participants, or customers that is not otherwise Restricted Information. Highly Confidential Information includes: A Participant's contract negotiations with the Processor or Administrator; personnel matters; information concerning the intellectual property of Participants or customers; and any document subject to the Attorney-Client Privilege or Work Product Doctrine.

[14] Confidential Information was defined by the Participants under Section 2(c) of the proposed policy as (i) any non-public data or information designated as Confidential by a majority vote of the Operating Committee; (ii) any document generated by a Participant or Advisor and designated by that Participant or Advisor as Confidential; (iii) the minutes of the Operating Committee or any subcommittee thereof unless approved by the Operating Committee for release to the public; and (iv) the individual views and statements of Covered Persons and SEC staff disclosed during a meeting of the Operating Committee or any subcommittees thereunder.

[15] Public Information was defined by the Participants under Section 2(d) of the proposed policy as (i) any information that is not either Restricted Information or Highly Confidential Information or that has not been designated as Confidential Information; (ii) any confidential information that has been approved by the Operating Committee for release to the public; or (iii) any information that is otherwise publicly available. Public Information includes, but is not limited to, any topic discussed during a meeting of the Operating Committee, an outcome of a topic discussed, or a Final Decision of the Operating Committee.

[16] The Administrator may, under delegated authority, designate documents as Restricted, Highly Confidential, or Confidential, which will be determinative unless altered by a majority vote of the Operating Committee.

[17] *See* Notice, *supra* note 6, 85 FR at 2215.

[18] *See* Section IV.E.(d) of the Nasdaq/UTP Plan (providing for the use of ''Executive Sessions'' in which the Operating Committee meets without members of the Advisory Committee present).

[19] The proposal requires that the policy be made available to the recipient and states that the recipient will be required to abide by the confidentiality policy.

[20] For the representatives of a Participant, the proposal specifies that appropriate remedies include a letter of complaint submitted to the SEC, which may be made public by the Operating Committee. For a member of the Advisory Committee, the proposal specifies that appropriate remedies include removal of that member from the Advisory Committee.

[21] With respect to Confidential Information that is generated by a Participant or member of the Advisory Committee, the Operating Committee may authorize its disclosure only with the consent of that Participant or Advisory Committee member.

[22] The proposal requires that the policy be made available to the recipient and states that the recipient will be required to abide by the confidentiality policy.

[23] The proposal further requires the name(s) of the person(s) who disclosed such Confidential Information to be recorded in any publicly available summaries of Operating Committee minutes.

[24] 17 CFR 608(b)(2).

[25] 15 U.S.C. 78k–1.

discussed in detail below are appropriate.

A. Scope

1. Applicability

In the Notice, the Commission solicited comments on, among other things, whether the proposed guidelines and procedures setting forth the circumstances in which disclosure of confidential information may be authorized are sufficiently clear and comprehensive.[26] Among other questions, the Commission asked whether commenters believe ''that the scope of the proposed Amendment is sufficiently comprehensive to cover all parties that might have access to confidential information, or should the scope be broadened to apply to additional classes of persons.'' For example, the Commission asked whether ''outsourced service providers (including, but not limited to, firms and persons that provide audit services, accounting services, or legal services to the Plan, the Administrator, or the Processor) [should] be subject to additional restrictions, particularly if they are directly or indirectly affiliated with a Participant, the Administrator, the Processor, or any entity that offers separately proprietary data products to a substantially similar customer base, *i.e.,* customers or potential customers of the SIPs.'' [27] The Commission further asked whether the Plan should ''explicitly preclude itself from engaging with an Administrator, Processor, auditor, or any agents or third parties thereof, unless the entity establishes, maintains, and enforces policies and procedures to safeguard confidential and proprietary information and to prevent its direct or indirect misuse'' and, if so, whether ''the Operating Committee [should] review those policies and procedures and/or should they be made public (*i.e.,* provided on the Plan's website).'' [28]

In response to the Notice, the Advisory Committee said it believes that ''the confidentiality policy should extend to any information obtained by outsourced service providers in order to ensure that information learned by such service providers is only shared with those individuals of the Operating Committee required to receive such information and in furtherance of the service provider's agreement with the plan.'' [29] Another commenter similarly stated that ''[o]utsourced service providers (including, but not limited to, firms and persons that provide audit, accounting, or legal services to the Plan(s), the Administrator, or the Processor) should be subject to additional restrictions, particularly if they are directly or indirectly affiliated with a Participant Administrator, Processor, or any entity that offers separately proprietary data products to a substantially similar customer base.'' [30] The commenter further recommended that the ''Plan(s) should explicitly preclude themselves from engaging with an Administrator Processor, auditor, or any agents or third parties thereof, unless the entity attests and adheres to the confidentiality policies and procedures established by the Plan . . . and provides conflicts of interest disclosures.'' [31]

After considering the comments received in response to the Amendment, the Commission believes that it is appropriate to modify the scope of the Amendment to extend it to affiliates and employees of the Operating Committee, a Participant, a Pending Participant, the Administrator, and the Processor. The Commission agrees with commenters that the scope of the proposed Amendment should be broadened to include other parties or persons that might have access to confidential information, including but not limited to outsourced service providers, such as firms and persons that provide audit services, accounting services, or legal services to the Plan, Administrator, or Processor.[32] The Commission believes that all parties that generate, receive, or have access to sensitive Plan-related information by virtue of their service to the Plan, or their affiliation with a party that has such access, should be subject to the same standards to protect the confidentiality of that information. Including them within the scope of the Amendment will strengthen the confidentiality of information protections afforded by the policy.

More specifically, the Commission is concerned about the possibility of a Participant exchange obtaining commercially valuable data and information through its affiliates and employees that have responsibilities to the Plan, and then using that information and/or sharing it with employees or affiliates of the Participant exchange to benefit the exchange's proprietary data businesses. The conflicts resulting from such access could influence decisions as to the Plan's operation and thereby impede its ability to achieve the goals of the Plan to ensure the ''prompt, accurate, reliable, and fair collection, processing, distribution and publication of information with respect to quotations for and transactions in such securities and the fairness and usefulness of the

[26] *See* Notice, *supra* note 6, 85 FR at 2217.

[27] *Id.*

[28] *Id.*

[29] Letter from CTA/UTP Advisory Committee to Vanessa Countryman, Secretary, Commission, dated January 24, 2020 (''Advisory Committee Letter'') at 2.

[30] Letter from Joseph Kinahan, Managing Director, Client Advocacy and Market Structure, TD Ameritrade to Vanessa A. Countryman, Secretary, Commission, dated February 4, 2020 (''TD Ameritrade Letter'') at 9.

[31] *Id.* Other comments received in response to the Commission's separate notice of a proposed order concerning a new NMS plan regarding consolidated equity market data (Securities Exchange Act Release No. 87906 (January 8, 2020), 85 FR 2164 (January 14, 2020) (File No. 4–757) (''Governance Notice'') also supported a robust confidentiality policy that would apply to SRO and non-SRO persons. *See, e.g.,* Letter from Sherry Madera, Chief Industry Government Affairs Officer, Refinitiv, to Vanessa Countryman, Secretary, Commission, dated February 27, 2020 at 3; Letter from Lisa Mahon Lynch, Associate Director, Global Trading, Wellington Management Company LLP, to Vanessa Countryman, Secretary, Commission, dated February 28, 2020 at 2; Letter from Anders Franzon, General Counsel, Members Exchange LLC, to Vanessa Countryman, Secretary, Commission, dated February 28, 2020 at 6; Letter from Jennifer W. Han, Associate General Counsel, Managed Funds Association, and Adam Jacobs-Dean, Managing Director, Global Head of Markets Regulation, Alternative Investment Management Association, to Vanessa Countryman, Secretary, Commission, dated February 28, 2020 at 5; Letter from Ellen Greene, Managing Director, Equity & Options Market Structure, Securities Industry and Financial Markets Association, to Vanessa Countryman, Secretary, Commission, dated February 28, 2020 at 6; Letter from Rich Steiner, Head of Client Advocacy and Market Innovation, RBC Capital Markets, LLC, to Vanessa Countryman, Secretary, Commission, dated February 28, 2020 at 4; Letter from Joe Wald, Chief Executive Officer, and Ray Ross, Chief Technology Officer; Clearpool Group, to Vanessa Countryman, Secretary, Commission, dated February 28, 2020 at 5; Letter from Daniel Keegan, Head of North America Market Securities Services, Co-Head of Global Equities & Securities Services, Citigroup Global Markets Inc., to Vanessa Countryman, Secretary, Commission, dated March 2, 2020 at 4.

[32] Firms and persons that provide audit services, accounting services, or legal services, depending on the services that they are performing for the Plan, may or may not be licensed and/or registered if they are not otherwise required to be so licensed or registered under applicable law. For example, a person that works on audits of SIP subscribers' data usage and customer classifications for compliance with SIP billing requirements might not herself be a registered public accountant. Persons that are registered and/or licensed may be subject to pre-existing professional standards of conduct that separately provide for the protection of confidential client information and impose other professional responsibility obligations. Whether persons are licensed and/or registered or not, the Commission believes that extending the Amendment to cover affiliates and employees is appropriate to ensure the protection of confidential information in light of the unique conflicts of interest inherent in Plan governance and operations. To the extent disclosure of confidential information is required by law or professional ethics obligations, the proposed Amendment provides for that possibility and allows such disclosure.

form and content of such information.'' [33]

Accordingly, the Commission is adding the phrase ''affiliates, employees, and'' to Section 1(b) and repeating the phrase ''a Participant, a Pending Participant, the Administrator, and the Processor,'' to provide that the policy will apply to ''affiliates, employees, and agents of the Operating Committee, a Participant, a Pending Participant, the Administrator, and the Processor.'' [34] Similarly, the Commission is adding the phrase ''Covered Persons'' to the start of Section 1(c) and deleting the words ''The Administrator and Processor,'' to track the scope of Section 1(b) and the term ''Covered Persons'' used therein. The Commission also is moving text, beginning with the second sentence of Section 1(c), to create a new Section (d) and adding thereto the phrase ''and the control of their Agents,'' to specifically require the written confidential information policies, which the Administrator and Processor must establish to protect information under their control, to also apply to information under the control of Agents of the Administrator and Processor. The Participants state that these provisions, like all others in the proposal, were discussed with, and incorporate input and comments received from, members of the Advisory Committee.[35] Consistent with comments received in response to the proposed Amendment from, among others, members of the Advisory Committee, however, the Commission believes that these changes are appropriate to help ensure that the scope of the proposed Amendment is sufficiently broad so as to encompass other parties or persons that might have access to confidential information.

Further, the Commission believes that it is appropriate to modify the reference to ''all members of the Advisory Committee'' in Section 1(b) to be ''all members of the Advisory Committee and their employers'' to require that Advisory Committee members' firms must protect the confidentiality of Plan information in the same way, for example, that a representative of a Participant's firm is required by this modified Amendment to protect the confidentiality of Plan information.[36] In addition, Section 1(b) of the proposed policy provides that ''[a]ll Covered Persons must adhere to the principles set out in this Policy.'' The Commission believes that it is appropriate to modify Section 1(b) to add a provision whereby ''all Covered Persons that are natural persons may not receive Plan data and information until they affirm in writing that they have read this Policy and undertake to abide by its terms.'' The Commission believes that this additional provision will strengthen Section 1(b) of the policy by prohibiting access to Plan data and information until a Covered Person has affirmed in writing that the Covered Person has read the policy and undertaken to abide by its terms.

2. Classification Based Solely on Content

With respect to proposed guidelines for the classification of information, the Commission solicited comments on whether information shared in Executive Sessions should be classified as Highly Confidential simply because it had been shared in an Executive Session, or whether information should ''be classified based solely on its content and competitive sensitivity.'' [37]

In response, one commenter stated its belief that ''information shared in Executive Session should be classified based solely on its content and competitive sensitivity, and not simply due to the fact that such information was shared during Executive Session.'' [38] Another commenter stated that ''information shared in Executive Session should not, by virtue of that fact alone, be treated as highly confidential. Rather, a case-by-case analysis is appropriate to determine whether or not information warrants confidential treatment.'' [39]

The Commission agrees with commenters that policies and procedures for the classification of information should be based on the content and sensitivity of the information, rather than on the venue in which the information is shared.

The Commission is therefore adding new Section 1(e) to require that ''[i]nformation will be classified solely based on its content.'' Consistent with that modification, the Commission believes that it is appropriate to modify the definition of ''Highly Confidential Information'' in Section 2(b) to delete therefrom a clause that would have classified information as ''Highly Confidential'' solely because it was shared in Executive Session or pursuant to the Executive Session policy. Specifically, the Commission is deleting subsection (i) containing the words ''(i) any data or information shared in an Executive Session or that would otherwise qualify for confidential treatment pursuant to the Plan's Executive Session Policy; and (ii)'' and making a conforming change to delete the word ''other'' from the start of current subsection (ii).[40] The Participants state that Executive Sessions are used sparingly to discuss a limited set of topics, as listed in the Plan's Executive Session policy, and that the proposed policy seeks to further facilitate the sharing of additional confidential information with the Advisory Committee.[41] The Commission recognizes the Operating Committee's efforts to limit the use of Executive Sessions. Consistent with comments received, however, the Commission believes that methods for classification of information should be based on the content and sensitivity of information, rather than on the forum in which the information is shared.

Executive Sessions may be appropriate for Participants to discuss information that, on its own merits, is Highly Confidential and therefore not appropriate for broad dissemination. Executive Sessions should not shield from public dissemination information that is not sensitive or customer-specific and would not otherwise fall within the definitions of Restricted or Highly Confidential. But by classifying information based merely upon its being shared in Executive Session, the proposed policy may have the effect of shielding information that was not otherwise restricted or confidential. The Commission believes that a content-based approach to classifying information should help balance the need to safeguard sensitive information

[33] 15 U.S.C. 78k–1(c)(1)(B).

[34] In addition, in the non-exhaustive list of Agents contained in Section 1(b), the Commission is adding the word ''auditors.'' While auditors are already covered as ''contractors or subcontractors,'' auditors have access to competitively sensitive non-public information. Explicitly listing them avoids any doubt that they are covered by the confidentiality policy.

[35] *See* Notice, *supra* note 6, 85 FR at 2214, 2215.

[36] This change, together with other modifications made by the Commission, should enhance the ability of Advisory Committee members to seek meaningful input from their respective employers while helping to ensure that standards for the sharing of protected information apply on equal terms to all Covered Persons. *See* Section 3(d)(iii) (allowing the Operating Committee to authorize Advisors to disclose particular Confidential Information for consultation purposes).

[37] *See* Notice, *supra* note 6, 85 FR at 2217.

[38] TD Ameritrade Letter, *supra* note 30, at 7. According to the commenter, ''[a]llowing information to be classified based on its content provides for a flexible policy that will mature without the need for amendment as markets evolve.'' *Id.*

[39] Letter from Rich Steiner, Head of Client Advocacy and Market Information, RBC Capital Markets, to Vanessa Countryman, Secretary Commission, dated February 4, 2020 (''RBC Letter'') at 2–3.

[40] As such, the definition no longer contains two subsections.

[41] *See* Notice, *supra* note 6, 85 FR at 2213.

with the important interest of providing greater transparency into the governance and operation of the Plan. The Commission does not believe that its modifications will inhibit information sharing within the Operating Committee. Rather, sensitive information, as well as information that is specific to individual persons and entities, that is Highly Confidential will continue to be protected, including through permissible use of Executive Sessions, while information that does not meet that standard can and should be shared with Advisors on the Operating Committee and, where appropriate, with the public.

3. Operating Committee Review of Policies

In the Notice, with respect to proposed policies and procedures for the classification of information, the Commission solicited commenters' views with respect to whether ''a need may arise for information or data that are not initially categorized as confidential to be categorized as such at a later point in time'' and, if so, whether the Operating Committee should ''be able to classify or de-classify material as appropriate based on a majority vote.'' [42] Similarly, the Commission asked whether the Amendment ''should require all Participants and other Covered Persons to establish, maintain, and enforce policies and procedures to safeguard confidential and proprietary information received via their participation in the Plan and to prevent its misuse by such Participants or entities controlling, controlled by, or under common control with such Participants.'' [43] The Commission further asked whether commenters agree ''that certain confidential information may become less sensitive if it is anonymized and aggregated'' and even whether ''certain types of restricted or highly confidential information could be anonymized and aggregated to the point where it could be classified as public.'' [44] The Commission asked about the methodology for anonymizing confidential information and whether the methodology should be standardized.[45] The Commission also asked whether these policies should ''be subject to review and approval by the Operating Committee, and be posted publicly, to help ensure their adequacy and completeness.'' [46]

In response, one commenter stated ''the Plan(s) should explicitly define the required policies and procedures to safeguard confidential and proprietary information'' and designate responsibility for their development to one body to ensure a standardized approach.[47] With respect to the classification of data or information, the commenter stated that ''a need may arise for information or data that are not initially categorized as confidential to be categorized as such at a later point in time,'' pointing out that one ''would anticipate the Plan Administrator may classify such document as Confidential subject to the next meeting of the Operating Committee, where they should be granted authority to review and re-classify or de-classify material as appropriate based on a majority vote.'' [48] With respect to methods for rendering information less sensitive, the commenter believed that ''[c]ertain confidential information may become less sensitive if it is anonymized and aggregated,'' adding that ''[c]ertain types of restricted or highly confidential information could be anonymized and aggregated to the point where it could be classified as confidential or public.'' [49] According to the commenter, ''[t]he methodology for redacting/aggregating/anonymizing confidential information should be standardized such that the Administrator, Processor, auditor, and all other relevant parties follow a consistent practice. The methodology should include requirements for what information should always be redacted/aggregated/anonymized (*e.g.,* customer names, size/demographic information that could reasonably be used to determine the name of the customer, etc.).'' [50] The commenter recommended that ''[i]f any information that is anonymized, aggregated or redacted could still reasonably be used, whether independently or with current information available in the industry, to identify less than or equal to two firms/Participants, then such information may not be re-classified to public.'' [51]

After considering the comments received in response to the Notice, the Commission believes that it is appropriate to modify Section 1(c) (now located in Section 1(d)), which requires the Administrator and Processor to establish written confidentiality policies, to more specifically provide that those documents should include ''policies and procedures that provide systemic controls for classifying, declassifying, redacting, aggregating, anonymizing, and safeguarding information.'' The Commission believes that adding this detail is appropriate because it outlines the items that the written confidentiality policies must, at a minimum, address in order to protect the confidentiality of Plan information.

In addition, the Commission believes that it is appropriate to require the Operating Committee to review and approve the confidentiality policies of the Administrator and Processor, upon adoption and on a periodic basis every two years thereafter or whenever changes are made, after which the policies would be publicly posted. As proposed, the policies would have been made available to the Operating Committee every two years or when changes are made.

The Commission believes that requiring the Operating Committee to review and approve these important policies in this manner will help ensure that they are clear, complete, and comply with the Amendment. The Commission believes it is appropriate specifically to require the Operating Committee to affirmatively approve (in addition to ''review'') the policies to ensure that the Operating Committee carefully considers and takes action on them. Requiring robust policies at the Administrator and Processor level, where some of the most sensitive information is generated, classified, and maintained for the Plan, is critical to the effectiveness of the Amendment. The Operating Committee can play an important role in protecting confidential information by carefully reviewing the policies of the Administrator and Processor and ensuring that they are consistent with the principles and procedures established in this Amendment. Finally, the Commission believes that it is appropriate to require the policies and procedures to be made publicly available, which will provide important transparency to market participants and the public about the steps the Processor and Administrator take to protect commercially sensitive information collected on behalf of the Plan. Further, the Commission believes that transparency via public dissemination should be favored to the greatest extent possible, and that when sensitive information can be anonymized or aggregated to reduce its sensitivity, such information should be anonymized and aggregated in accordance with a clear, standardized methodology to be consistently applied by Administrator and Processor. Thus, as revised, the Commission believes that

[42] *Id.* at 2217.
[43] *Id.* at 2216–2217.
[44] *Id.* at 2217.
[45] *Id.*
[46] *Id.*
[47] TD Ameritrade Letter, *supra* note 30, at 4.
[48] *Id.* at 6.
[49] *Id.* at 9.
[50] *Id.*
[51] *Id.*

Section 1(d) creates an effective process to develop clear and robust confidentiality policies for the Administrator and Processor, and to periodically update such policies as technology and markets evolve.

B. Definitions: Public Information

In the Notice, the Commission solicited comments on, among other things, whether certain SIP-related information should be considered public and available to be shared outside of the Operating Committee.[52] The Commission further asked whether ''information that is not classified at some level of confidentiality should be considered public and may be shared freely outside of the Operating Committee.'' [53] The Commission also solicited comment on whether Advisory Committee members needed access to sensitive information of substantial commercial and competitive value in order to perform their duties, such as underlying information relied on by Participants when making decisions on funding improvements to the SIP.[54]

In response, one commenter stated that ''[i]nformation that is not classified at some level of confidentiality should be considered public and may be shared freely outside of the Operating Committee. Specific information that [the commenter] believes should be considered public and shared outside of the Operating Committee may include shared Plan revenue information, industry subscriber and quote metrics, Processor transmission metrics and Operating Committee minutes.'' [55] According to the commenter, ''[t]his information provides transparency into the operation of the Plan(s), valuable for making determinations on the efficacy of Plan operations.'' [56] Two commenters supported the adoption of specific policies to specify what information should be made available outside of Executive Sessions or otherwise.[57] One commenter expressed concern about ''the inclusion of the individual views and statements of Covered Persons during a meeting of the Operating Committee as Confidential Information'' and suggested that ''at a minimum, a summary of direction/votes made by Covered Persons should be included in Committee Minutes, which would become public information.'' [58] According to the commenter, ''[w]ithout transparency into the views attributable to individual Covered Persons responsible for directing Plan operations through their role on the Operating Committee, members of the public, as consumers of plan data, would be unable to determine whether those Covered Persons were acting in the best interests of the Plan(s) and were effective in their roles.'' [59] One commenter supported disclosure of audited financial information and data and the use of funds by the Plan.[60] Another commenter stated that ''the public deserves to know how much profits the exchanges make . . . [and] information that is currently non-public about the costs and operations [of the Plan].'' [61]

One commenter expressed concern ''regarding the classification of all contracts between the Operating Committee and its agents as Confidential Information,'' stating that ''anyone with an interest in the Plan(s) should have sufficient transparency into the agents utilized by the Plan(s) to be able to contextualize and understand whether or not a conflict of interest may exist between the Operating Committee and contracted agents.'' [62] According to the commenter, this ''may be a situation in which the Plan(s) allow for the flexibility to redact sensitive information from certain documents (*e.g.,* pricing terms and conditions) and allow the classification of such information to remain public.'' [63]

As discussed above regarding the classification of Plan-related information based solely on its content, the Commission believes that public availability of information should be favored to the greatest extent possible while still protecting sensitive information. After considering the comments received in response to the Notice, the Commission believes that this principle extends to certain information discussed by or relied upon by the Participants when making decisions on the administration and operation of the SIPs. Making this information public, so that members of the Advisory Committee and others can review it, will provide Advisors and members of the general public with access to previously unavailable information on the administration and operation of the SIPs, which serve an important public function in the equities market. The SIPs are critical regulatory market infrastructure, authorized by Congress and operated jointly by self-regulatory organizations as a key part of the securities markets, which Congress categorized as ''an important national asset.'' [64] Market participants rely on the SIPs to inform their trading and assure their regulatory compliance efforts. Requiring greater transparency into the Plan's operations should provide market participants and the general public with a more comprehensive understanding of Plan operations, which should, in turn, facilitate their ability to make informed assessments and actively contribute, whether through feedback, input, or otherwise, to the effective governance of the Plan. And classifying the information discussed below as Public Information will facilitate market participants' and the public's ability to track, assess, and contribute to SIP governance and operations and therefore is consistent with the public interest, the protection of investors, and the maintenance of fair and orderly markets.

While the proposed policy defines the term ''Public Information,'' the proposal does not expressly provide that any specific, identifiable information or data relating to plan governance, operations, or administration is public, other than, as an illustrative example, ''any topic discussed during a meeting of the Operating Committee, an outcome of a topic discussed, or a Final Decision of the Operating Committee. . . .'' [65] Defining more information on Plan governance, operations, and administration as ''Public Information,'' while still protecting sensitive information, should strengthen Plan administration and governance by promoting transparency, thereby facilitating review and feedback from market participants and the public. In addition, the Advisory Committee members and other firms and members of the public currently are prevented from seeing much of the underlying information relied on by the Participants when making decisions on funding of and improvements for the SIP. With greater access to information on the Plan's governance, operations, and administration, Advisors will be

[52] *See* Notice, *supra* note 6, 85 FR at 2217.

[53] *Id.*

[54] *See id.* at 2217–2218.

[55] TD Ameritrade Letter, *supra* note 30, at 7.

[56] *Id.*

[57] *See* Letter from Jeff Brown, Senior Vice President—Legislative and Regulatory Affairs, Charles Schwab, to Vanessa Countryman, Secretary, Commission, dated February 4, 2020 (''Charles Schwab Letter''), at 3 and RBC Letter, *supra* note 39, at 3.

[58] TD Ameritrade Letter, *supra* note 30, at 5–6.

[59] *Id.*

[60] *See* Charles Schwab Letter, *supra* note 57, at 3.

[61] Letter from Tyler Gellasch, Executive Director, Healthy Markets Association to Vanessa Countryman, Secretary, Commission, dated February 20, 2020 (''Healthy Markets Letter''), at 20.

[62] TD Ameritrade Letter, *supra* note 30, at 6.

[63] *Id.* The Commission is not modifying the Amendment to specifically include this requirement, but the Operating Committee could consider this suggestion.

[64] 15 U.S.C. 78k–1(a)(1)(A).

[65] *See* Section 2(d) of the policy as proposed.

better able to perform their responsibilities and will have the benefit of feedback from other firms and members of the public to inform their decision-making. The Operating Committee will correspondingly benefit from a valuable source of better informed input.

Thus, the Commission believes that it is appropriate to modify the definition of ''Public Information'' in Section 2(d) to include the following additional items of information: [66]

- The duly approved minutes of the Operating Committee and any subcommittee thereof with detail sufficient to inform the public on matters under discussion and the views expressed thereon (without attribution),[67]
- Plan subscriber and performance metrics, and
- Processor transmission metrics.

With respect to the public availability of the duly approved minutes for each meeting, the Commission is not requiring publicly available minutes to include legally privileged, Restricted, or Highly Confidential Information. Rather, the duly approved minutes generally must reflect, at a minimum, what entity met, the time and date of the meeting, the parties present, the topics discussed and views expressed thereon (without attribution), and the decisions made and votes recorded. Defining this information as ''Public Information'' will facilitate broader awareness of the governance of the critical market infrastructure for which the Participants are responsible under the Plan. In turn, broader awareness of Plan governance can facilitate the ability of market participants and the public to comment and provide input on important matters being considered by the Participants for the SIPs, which ultimately will promote fair and orderly markets and the protection of investors in the public interest to extent their input helps shape future Plan initiatives and strengthen the SIPs on which market participants and the public rely.

Finally, the Commission believes, as supported by the commenter discussed above, that certain core metrics on the Plan's subscribers, performance, and data transmission should be public information in order to promote transparency of the Plan's operation and oversight. The Plan already makes such information publicly available, and specifically including it within the definition of Public Information recognizes that fact and ensures that such information, as well as similar information that may be prepared in the future, can continue to be made publicly available.[68]

Public availability of Plan subscriber and performance metrics and Processor transmission metrics affords a limited, basic level of transparency of the key metrics associated with Plan operations, such as number of subscribers by category, system availability metrics, latency, and other information. Public transparency of this information, some of which already currently occurs, should provide greater transparency into important aspects of the Plan's operation and oversight. As noted above, the SIPs are critical regulatory market infrastructure, operated jointly by self-regulatory organizations providing quote and trade information upon which market participants and the public rely and which Congress categorized as ''an important national asset.'' [69] As market participants rely on the SIPs to inform their trading and assure their regulatory compliance efforts, they have an interest in effective Plan operations and ensuring that the SIPs keep pace with evolving technology, markets, and regulatory developments. Classifying Plan subscriber and performance metrics and Processor transmission metrics as ''Public Information'' will facilitate market participants' and the public's ability to monitor, assess, and contribute to improving SIP operations and the ability of the SIPs to fulfill their purpose as critical market infrastructure as the markets evolve, thereby facilitating the maintenance of fair and orderly markets in the future.

For the reasons discussed throughout this order, the Commission believes that transparency of key Plan information, including duly approved Operating Committee meeting minutes, and performance, subscriber, and transmission metrics, is consistent with the public interest, the protection of investors, and the maintenance of fair and orderly markets.[70]

C. Procedures

1. General Procedures

As discussed above, the Commission believes that it is appropriate to modify the Amendment to require the Administrator and Processor to establish written confidentiality policies, which, among other things, address the safeguarding of confidential information. As a conforming change to Section 3(a)(iii), which requires the Administrator to ensure that documents are properly labeled, the Commission is modifying that provision to include the phrase ''and, if applicable, electronically safeguarded.'' [71] This conforming modification reflects the fact that the Administrator would be required to safeguard electronic documents within its control and/or possession such as by, for example, encrypting them during transmission and/or protecting them with a password or other access control.

2. Procedures for Restricted and Highly Confidential Information

In the Notice, the Commission solicited comments on, among other things, whether commenters believe ''that Participants involved in the operation or governance of each Plan have, by consequence of their position,

[66] Further, the Commission is adding the phrase ''except to the extent covered by (a), (b), or (d)'' to the start of Section 2(c) to reflect that nothing in Section 2(c) can alter what is defined as Restricted, Highly Confidential, or Public. For example, the Operating Committee, a Participant, or an Advisor could not designate as Restricted Information, Highly Confidential Information, or Confidential Information something that falls within the definition of Public Information. The Commission also is modifying the definition of ''Public Information'' under Section 2(d)(vi) concerning ''any information that is otherwise publicly available'' to add the phrase ''except for information made public as a result of a violation of this Policy or any applicable law or regulation'' to clarify that ''otherwise publicly available'' refers to information that is legally and appropriately within the public domain.

[67] The Commission also is making a conforming change to Section 2(c) to reflect this provision by deleting subsection (iii) which, as proposed, stated: ''the minutes of the Operating Committee or any subcommittee thereof unless approved by the Operating Committee for release to the public.''

[68] *See* Metrics published by the Plan, *available at https://www.utpplan.com/metrics.* Current subscriber metrics publicly disseminated include quarterly statistics on nonprofessional subscribers, professional subscribers, households, quote usage, internal vendors, external vendors, and non-display vendors. Current key operating metrics publicly disseminated by the Plan include statistics on system availability, peak messages (for certain defined periods of time), capacity messages (for certain defined periods of time), capacity versus peak ratios, peak transactions per day, capacity transactions per day, average and median latency, and various percentile latencies. As modified, the Amendment provides that this category of information will be considered Public Information. Accordingly, similar information prepared in the future that falls under these categories will be classified as Public Information.

[69] 15 U.S.C. 78k–1(a)(1)(A).

[70] The Plan currently publishes information on plan operations, including summaries of the General Sessions from the Operating Committees' quarterly meetings, plan policies, quarterly and monthly performance metrics, pricing schedules, and technical specifications. The Plan also makes publicly available certain information on SIP-related revenues, including trade and quote revenue distributed to Participants, per trade and quote message revenue (in aggregate) distributed to Participants, and revenue earned by fee type. This revenue data is updated on a quarterly basis, with a 60 day lag, and is available on the Plan's website at *http://www.utpplan.com/metrics.*

[71] The Commission also is modifying Section 3(a)(iii) to add the word ''The'' before the word ''Administrator.''

access to information of substantial commercial and competitive value.'' [72] If so, the Commission asked commenters to consider whether ''certain of that information, including customer-specific financial information, customer-specific audit information, personally identifiable information, and information concerning the intellectual property of Participants or customers, is highly sensitive to such a degree that its possession and use should be more tightly controlled.'' [73]

The Commission asked whether ''any Participant or Advisory Committee member that is directly involved in the management, sale, or development of similar proprietary market data products that may be sold to customers of the SIPs should have access to any customer information from the SIPs'' or whether Operating Committee members, as well as the Administrator, Processor, and auditor ''should be prohibited, unless otherwise required by law, from sharing confidential information with individuals that are not involved with the operation of the Plan and individuals employed by or affiliated with the same entity if such individuals are involved in the management, sale, or development of proprietary data products that are offered separately to a substantially similar customer base, *i.e.,* customers or potential customer of the SIPs.'' [74]

With respect to the Participants' representatives, the Commission sought comment on whether ''Participants' representatives should be subject to restrictions and/or information barriers as part of the confidentiality policy to address their direct or indirect involvement in the development or sale of proprietary data products to SIP customers.'' [75] The Commission further asked for comment on whether ''Participants' access to a list of the Processor's customers as well as information on those customers' data usage and fees paid to the Plan has competitive implications'' and, if so, whether ''the Plan should require recusal in certain circumstances (*e.g.,* during Executive Sessions or Operating Committee meetings) because the potential for misuse of competitively sensitive confidential information is too great.'' [76]

Further, the Commission solicited comment on whether additional protections are needed when ''a Participant is either employed by or affiliated with an entity that offers proprietary data products that are offered for sale to a substantially similar customer base (*i.e.,* customer or potential customers of the SIPs).'' [77] The Commission also requested comment on whether a Participant should be able to share information with other employees and agents, asking whether ''outsourced service providers (including, but not limited to, firms and persons that provide audit services, accounting services, or legal services to the Plan, the Administrator, or the Processor) [should] be subject to additional restrictions, particularly if they are directly or indirectly affiliated with a Participant, the Administrator, the Processor, or any entity that offers separately proprietary data products to a substantially similar customer base, *i.e.,* customers or potential customers of the SIPs.'' [78] In response to the Notice and requests for comment as to whether the proposed Amendment should be further enhanced, the Commission received comments and input from the Advisory Committee to the Plan, as well as from several other commenters. The Advisory Committee had concerns with the proposed situations in which Highly Confidential and Confidential information may be shared by a Participant representative and Advisors. The Advisory Committee explained that:

> Under the proposed policy, Highly Confidential and Confidential information may each be shared by a representative of a Participant 'to other employees or agents of the Participant or its affiliates only as needed for such Covered Person to perform his or her function on behalf of the Participant, as reasonably determined by the Covered Person.' We believe this standard is insufficient. The rationale that information may be shared 'to perform his or her function on behalf of the Participant' assumes that the representative's role on the committee is to further the interests of the Participant rather than the plan—this strikes at the heart of the conflict of interest inherent in the governance of the plan. Such information should only be shared to further the interests of the plan, and such sharing should at least be disclosed to and potentially authorized by the Operating Committee. In situations where the Participant representative is subject to a conflict due to their own responsibility regarding the sale of proprietary exchange data, the policy should limit access to such confidential information by the Participant representative.[79]

One commenter stated that the proposed policy should include ''requirements to prevent the sharing of information with a competitive value to those individuals who have direct responsibility for the management, sale, or development of proprietary data products offered separately.'' [80] The commenter recommended that control procedures for restricted, highly sensitive or confidential information ''should be explicitly defined'' and should include ''required logging of the sharing of Restricted and Highly Confidential Information,'' the ''required use of common logical security controls'' such as encryption and password protection, and ''standardized procedures for the redaction/aggregation/anonymization of information.'' [81] The commenter also stated that with respect to Restricted and Highly Confidential Information, the policy should not allow for the automatic sharing of information between the Administrator and Processor or the Participant and its employees or agents unless required for performance of responsibilities as required by the Plan; the commenter cited customer audit information as an example.[82] With respect to sharing Restricted Information, the commenter also stated its belief that if unredacted information is shared in Executive Session, ''the Administrator should also ensure that no parties with a conflict of interest are present in such session, or if so, should develop procedures to require that individual's recusal to ensure they do not receive information or significant competitive value.'' [83] With respect to the classification of information or data generated or discussed by the Operating Committee, the commenter stated its belief that the proposal should give non-SRO members information available in executive session, because ''[n]on-SRO members may provide valuable feedback and insight into decisions made with respect to an Administrator, Processor, auditor, or third-party service provider.'' [84] An additional commenter stated that ''if the Administrator function is staffed by personnel of one of the Participant exchanges, there must be a separation of functions'' and those personnel ''should

[72] Notice, *supra* note 6, 85 FR at 2216.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.* While the Commission is not modifying this Amendment to require recusal, it is, as discussed below, modifying provisions concerning the disclosure of Highly Confidential Information and Confidential Information to others. In addition, the Commission separately is approving modified amendments to address the Plan's conflicts of interest policies, which, as approved, do provide for recusal in certain circumstances. *See* Securities Exchange Act Release No. 88824 (May 6, 2020).

[77] Notice, *supra* note 6, 85 FR at 2217.

[78] *Id.*

[79] Advisory Committee Letter, *supra* note 29, at 2.

[80] TD Ameritrade Letter, *supra* note 30, at 3.

[81] *Id.* at 2–3. These detailed suggestions are beyond the scope of this Amendment, but the Operating Committee could consider them in the appropriate context.

[82] TD Ameritrade Letter, *supra* note 30, at 3.

[83] *Id.*

[84] *Id.* at 6–7.

not be employed by the Participant's proprietary data business line, and they should not share with the Participant's proprietary data business line confidential SIP information obtained in their role as administrator.'' [85]

After considering the comments received, the Commission believes that it is appropriate to modify the procedures concerning Restricted Information and Highly Confidential Information. Given that Restricted Information and Highly Confidential Information both contain highly sensitive and entity-specific information, the Commission believes that Covered Persons in possession of such information should protect that information in a substantially similar way by not disclosing it to others, including Agents and outside affiliated persons, unless an exception exists.[86]

The parties involved in the governance of the Plan and the SIP are privy to confidential and proprietary information generated in connection with the Plan. The Commission believes it is important to protect the confidentiality of certain SIP-related information because some Participant exchanges or their affiliates have a dual role as both an SRO jointly responsible for the operation of the Plan, on one hand, and, on the other hand, as part of a publicly held company that offers proprietary data products and connectivity services. As a consequence of this dual role, an exchange's representative on the Plan's Operating Committee may have conflicting responsibilities both to the exchange's proprietary data business as well as to the SIP. These potential conflicts of interest are of particular concern because the proprietary data products offered by an exchange generate revenue in addition to the revenue the exchange receives from the Plan.

Allowing sensitive Plan-related information to be shared with and disclosed to non-Plan personnel of the Participant—particularly those responsible for the Participant's own proprietary data business that competes with the SIP—could create a potential conflict. The Commission is concerned about the potential for such sharing as non-Plan personnel likely would have no need to know such information as they have no responsibilities to the Plan. Further, if Restricted Information or Highly Confidential Information is disclosed to those persons, such persons could use the competitively valuable non-public information for purposes unrelated to, and potentially inconsistent with, Plan business. The Commission believes that Restricted Information and Highly Confidential Information generated in connection with the operation of the Plan and its SIP should be retained in the confidences of Plan and SIP personnel not used in ways that could potentially harm the interests of the Plan to the extent the information is used to further the competitive advantage of a Participant.

Therefore, the Commission is modifying Section 3(b)(i), which says that Restricted Information will be kept in confidence by the Administrator and Processor, to begin that subsection with the following: ''Except as provided below, Covered Persons in possession of Restricted Information are prohibited from disclosing it to others, including Agents. This prohibition does not apply to disclosures to the staff of the SEC or as otherwise required by law or to other Covered Persons as expressly provided for by this Policy.'' [87] The change is intended to assure that the Administrator and Processor, who are required by the policy to ''[keep] in confidence'' Restricted Information, do not disclose that information to outside persons who may be directly or indirectly affiliated with them, including employees, agents, service providers, and subcontractors. The Commission believes it would be inconsistent with the ''[keep] in confidence'' standard for the Administrator or Processor to disclose Restricted Information to affiliated persons, and is thus modifying the Amendment to state so explicitly. The Commission believes that Restricted Information, including personally identifiable information, customer-specific financial information, and audit information, is highly sensitive to such a degree that its possession and use should be tightly controlled.

In addition, the Commission is modifying Section 3(c)(i)(1) to be parallel to the Section 3(b)(i)(1) on Restricted Information. As modified, Section 3(c)(i)(1) reads: ''Except as provided below, Covered Persons in possession of Highly Confidential Information are prohibited from disclosing it to others, including Agents. This prohibition does not apply to disclosures to the staff of the SEC or as otherwise required by law or to other Covered Persons authorized to receive it.'' The Commission believes that the proposed Amendment's restrictions on the disclosure of Highly Confidential Information to an Executive Session of the Operating Committee or to the Legal Subcommittee reflect the highly sensitive and commercially valuable nature of that information. In light of the value and sensitivity of such information, the Commission shares commenters' concerns about circumstances in which a Participant's representative, who has access to the information, may be involved in the development or sale of proprietary data products to a customer base similar to that of SIP customers. Thus, the Commission believes that the use and possession of Highly Confidential Information should be tightly controlled to prevent a Participant's representative from disclosing such information to affiliated persons.

3. Procedures for Confidential Information

Most of the questions and potential modifications in the Notice discussed above for Restricted Information and Highly Confidential Information also relate to Confidential Information. In addition, in the Notice, the Commission also solicited comments on, among other things, whether ''commenters believe that the Plan should require all Participants and other Covered Persons to establish, maintain, and enforce policies and procedures to safeguard confidential and proprietary information received via their participation in the Plan and to prevent its misuse by such Participants or entities controlling, controlled by, or under common control with such Participants.'' [88] More specifically, the Commission asked whether commenters ''believe that the proposed provisions allowing Participants to disclose confidential and highly confidential information to other employees or agents of the Participant or its affiliates as needed as they reasonably determine'' are appropriate.[89] Among other things, the Commission also solicited comments on whether Participants' representatives should be subject to restrictions and/or information barriers to address their direct or indirect involvement in the development or sale of proprietary data products to SIP customers.[90]

[85] Charles Schwab Letter, *supra* note 57, at 2–3.

[86] *See* Section 2(a) of the Amendment, defining Restricted Information (as including ''highly sensitive customer-specific'' information as well as ''Personal Identifiable Information'') and Highly Confidential Information (as including ''highly sensitive Participant-specific, customer-specific, individual-specific, or otherwise sensitive information'').

[87] In addition, the Commission is modifying Section 3(b)(i)(3) to add ''staff of the'' in front of ''SEC'' to conform to Section 3(b)(i)(1).

[88] Notice, *supra* note 6, 85 FR at 2216–2217.

[89] *Id.* at 2217.

[90] *See id.* at 2216.

In response to the Notice, including the Commission's solicitation of comments on these issues and on whether the proposed Amendment should be further enhanced, the Advisory Committee stated that ''Advisors may only share Confidential Information to solicit industry feedback and then only if specifically authorized by the Operating Committee'' and recommended that there ''is no reason for Participant representatives and Advisors to have different standards for sharing information—in each case it should only be to further the interests of the plan, and the standard for determining that threshold should be equivalent.'' [91] The Advisory Committee further recommended that the provisions protecting Confidential Information ''should extend to any information obtained by outsourced service providers in order to ensure that information learned by such service providers is only shared with those individuals of the Operating Committee required to receive such information and in furtherance of the service provider's engagement and the plan.'' [92]

As discussed above in the context of Restricted Information and Highly Confidential Information, the Advisory Committee also objected to the proposed standard that would allow a Participant's representative to share Highly Confidential Information and Confidential Information ''to other employees or agents of the Participant or its affiliates only as needed for such Covered Person to perform his or her function on behalf of the Participant, as reasonably determined by the Covered Person.'' [93] Believing that standard to be ''insufficient,'' the Advisory Committee criticized that provision as assuming ''that the representative's role on the committee is to further the interests of the Participant rather than the plan,'' which the Advisory Committee said ''strikes at the heart of the conflict of interest inherent in the governance of the plan.'' [94] The Advisory Committee recommended that confidential information ''should only be shared to further the interests of the plan, and such sharing should at least be disclosed to and potentially authorized by the Operating Committee'' and where a Participant's representative ''is subject to a conflict due to their own responsibility regarding the sale of proprietary exchange data, the policy should limit access to such confidential information by the Participant representative.'' [95]

One commenter agreed that the standard should be the same for all Covered Persons, and that any confidential information should be shared ''as reasonably determined to perform [the Covered Person's] function.'' [96] Another commenter believed that control procedures need to be sufficient to prevent disclosure to ''individuals without specific reason to receive such information to address their responsibilities according to the Plan(s) requirements.'' [97] That commenter recommended that the proposed policy include ''requirements to prevent the sharing of information with competitive value to those individuals who have direct responsibility for the management, sale, or development of proprietary data products offered separately.'' [98] The commenter further recommended that, given the potential conflicts of interests involved and the difficulties associated with mitigating such conflicts, ''Participants should be explicitly prohibited from disclosing restricted, highly confidential and confidential information to other employees or agents of the Participant or its affiliates unless authorized to do so on a case-by-case basis from the Operating Committee, and only if required to do so for such individual to perform his or her function on behalf of the Plan, unless such disclosure is required by law.'' [99]

After considering the comments received, the Commission believes it is appropriate to modify the Amendment concerning the procedures for protecting Confidential Information. First, the Commission is modifying Section 3(d)(i), which currently allows Covered Persons to disclose Confidential Information to other Covered Persons. As discussed above, the Commission has expanded the definition of Covered Persons to include affiliates and employees, to whom disclosing Confidential Information might not be appropriate. Accordingly, the Commission is modifying Section 3(d)(i) to provide that a Covered Person ''may only disclose Confidential Information to other persons who need to receive such information to fulfill their responsibilities to the Plan.'' In addition, disclosure will continue to be permitted to staff of the SEC, as authorized by the Operating Committee, or as otherwise required by law.[100] For the same reasons discussed above with respect to Restricted Information and Highly Confidential Information, the Commission shares commenters' concerns about circumstances in which a Participant's representative may be involved in the development or sale of proprietary data products to a customer base similar to that of SIP customers. If the Participant's representative straddles both roles simultaneously, or provides Confidential Information to other employees of the Participant, the Confidential Information can be used to benefit the Participant's proprietary data business in a manner contrary to the interests of the Plan.

Similarly, the Commission is modifying Section 3(d)(iv), which applies to the sharing of information between a Participant's representative and other employees or agents of the Participant. As proposed, the provision would allow a Participant's representative to disclose Confidential Information (and Highly Confidential Information) ''to other employees or agents of the Participant or its affiliates only as needed for such Covered Person to perform his or her function on behalf of the Participant, as reasonably determined by the Covered Person.''

[91] Advisory Committee Letter, *supra* note 29, at 2.

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] Charles Schwab Letter, *supra* note 57, at 3. Another comment received in response to the Governance Notice recommended that the confidentiality policy standards should be the same for both the SROs and non-SROs and further suggested that for the non-SRO members to be able to effectively engage with the Operating Committee, they should be able to exercise reasonable discretion in sharing with others within their firm information that may be relevant to policy issues and proposals being considered by the SROs. *See* Letter from John Ramsay, Chief Market Policy Officer, Investors Exchange, LLC, to Vanessa Countryman, Secretary, Commission, dated March 4, 2020 at 6. A separate comment received in response to the Governance Notice thought that the proposed Amendment would improve the handling of confidential information and is designed both to protect confidential information from misuse and to facilitate the sharing of confidential information with the Advisory Committee. *See* Letter from Patrick Sexton, EVP, General Counsel and Corporate Secretary, Cboe Global Markets, Inc., to Vanessa Countryman, Secretary, Commission, dated February 28, 2020 at 5.

[97] TD Ameritrade Letter, *supra* note 30, at 2.

[98] *Id.* at 3.

[99] The commenter also stated that if disclosure is required by law, the Covered Person should be required to first notify the Operating Committee so as to provide it with an opportunity to redact information or to dispute the requirement to provide it in its entirety. *See id.* at 8. The Commission is not modifying the Amendments to specifically include this requirement, but the Operating Committee could consider this suggestion.

[100] The Commission is making non-substantive wording changes to the last sentence of Section 3(d)(i) to accommodate the revisions to the beginning of that sentence. Specifically, it is separating out the second part of the sentence into a stand-alone sentence that continues to provide that: ''A Covered Person also may disclose Confidential Information to the staff of the SEC, as authorized by the Operating Committee as described below, or as may be otherwise required by law.''

The Commission is striking the phrase ''Participant, as reasonably determined by the Covered Person'' and the phrase ''and Highly Confidential Information'' such that the revised provision will provide that ''A Covered Person that is a representative of a Participant may be authorized by the Operating Committee to disclose particular Confidential Information to other employees or agents of the Participant or its affiliates only in furtherance of the interests of the Plan as needed for such Covered Person to perform his or her function on behalf of the Plan.''

Without this change, the Commission agrees with commenters that the protections in the proposed policy would be insufficient to adequately address circumstances in which a Participant's representative may be involved in the development or sale of proprietary data products to a customer base similar to that of SIP customers. The Commission believes that an exchange's commercial interests in its proprietary data businesses and its potential access to confidential information generated by the Plan and its SIP create potential conflicts of interest, which have the potential to inappropriately influence decisions as to the Plan's operation and thereby impede the Plan's ability to ensure the ''prompt, accurate, reliable, and fair collection, processing, distribution and publication of information with respect to quotations for and transactions in such securities and the fairness and usefulness of the form and content of such information.'' [101] Limiting the disclosure of Confidential Information to situations where the disclosure is reasonably necessary to further the interests of the Plan in the performance of the person's role with the Plan should help mitigate the conflict by protecting against misuse of commercially valuable non-public information.

Further, the Commission is making a change to conform Section 3(d)(iii) to the modifications it made to Section 3(d)(iv) so that both Advisors and Participants' representatives will be subject to the same standard with respect to disclosing Plan-related Confidential Information. As modified, Advisors may be authorized by the Operating Committee to disclose particular Confidential Information ''only in furtherance of the interests of the Plan. . . .'' Advisors will still be required to take any steps requested by the Operating Committee to prevent further dissemination of that Confidential Information. The Commission agrees with commenters that the standard for sharing Confidential Information should be the same for Covered Persons that are representatives of a Participant as well as Advisors, and be limited to situations in which the disclosure is made to further the interests of the Plan. Regardless of the identity of the person in possession of Confidential Information, the Commission believes that information that is labeled as Confidential Information should be protected to the same extent by all Covered Persons. If such information is appropriate to share more broadly, then it should be classified as Public Information. The Commission is therefore modifying the Amendment so that members of the Advisory Committee are treated like Participants' representatives in this regard.

4. Unauthorized Disclosures

In the Notice, the Commission solicited comment on remedies for disclosures inconsistent with the proposed policy. As proposed, the policy provides that unauthorized disclosures of Highly Confidential Information, as determined by the Operating Committee acting by majority vote, will be subject to an ''appropriate remedy'' that could include a letter of complaint against a Participant's representative, or the removal of an Advisor from the Advisory Committee.[102] With respect to Confidential Information, the policy provides that unauthorized disclosure will be self-reported to the Chair of the Operating Committee and disclosed in the minutes. The Commission asked, among other things, whether these proposed remedies are sufficient to deter unauthorized disclosure, or whether any other consequences of such disclosure should be provided.[103] The Commission also asked whether commenters believe that ''appropriate remedies for Participants and Advisors should differ, or should potential remedies for Participants that disclose confidential information also include the possibility of removal of that Participant from the Operating Committee.'' [104]

In response, one commenter stated that ''[r]emedies for unauthorized disclosure of any confidential information, regardless of classification, should be the same irrespective of the nature of the Covered Person'' and that ''breaches by a Covered Person should be disclosed to the Operating Committee, recorded, and reviewed by the Operating Committee for determination upon majority vote of an appropriate remedy, which should include remedies up to and including: Required recusal of future discussions of related confidential topics, or removal from any role with respect to Plan Activities.'' [105] According to the commenter, ''[a]ny reviews of votes regarding a breach should require recusal of such Covered Person who caused the breach.'' [106] Another commenter believes that a Participant representative should be removed from the Operating Committee if she is in violation of the Confidentiality Policy, just as an Advisory Committee member can be removed as described in the Amendment.[107]

After considering the comments received in response to the Notice, the Commission believes that it is appropriate to modify Section 3(d)(vi) to specifically provide a process for a Covered Persons to report potential unauthorized disclosures to the Chair of the Operating Committee so that the Amendment does not rely solely on self-reporting of unauthorized disclosures. Specifically, the Commission is adding the following new sentence to the beginning of Section 3(d)(vi): ''A person that has reason to believe that Confidential Information has been disclosed by another without the authorization of the Operating Committee or otherwise in a manner inconsistent with this Policy may report such potential unauthorized disclosure to the Chair of the Operating Committee.'' [108] The Participants in their submission state that the proposal addresses unauthorized disclosure insofar as a Covered Person who discloses Confidential Information without the authorization of the Operating Committee would be obligated to self-report such disclosure to the Chair of the Operating Committee, which would then be recorded in the minutes of the Operating Committee.[109] The Commission believes that relying on self-reporting is insufficient. Rather,

[101] 15 U.S.C. 78k–1(c)(1)(B).

[102] *See* Section 3(c)(ii).

[103] *See* Notice, *supra* note 6, 85 FR at 2218.

[104] *Id.*

[105] TD Ameritrade Letter, *supra* note 30, at 10 (internal quotation marks omitted).

[106] *Id.*

[107] *See* Charles Schwab Letter, *supra* note 57, at 3. The Commission is not modifying the Amendment to remove a Participant from the Operating Committee in the manner suggested by the commenter. The Participants, as SROs, have legal obligations and responsibilities under the Act, including with regard to operating the Plan. *See* 15 U.S.C. 78k–1(a)(3)(B). Requiring their removal from the Operating Committee would impede their ability to fulfil their statutory requirements.

[108] In light of the new first sentence, the Commission is making a conforming change to the second sentence of Section 3(d)(vi) to begin with the phrase ''In addition.''

[109] *See* Notice, *supra* note 6, 85 FR at 2215.

the Commission believes that providing a formal mechanism for any Covered Person as well as others to report potential unauthorized disclosures will assure such individuals that they can bring such instances to the attention of the leadership of the Operating Committee.[110] This modification is intended to make clear that persons who have reason to believe that Confidential Information has been disclosed by another without the authorization of the Operating Committee or otherwise in a manner inconsistent with this Policy may report such potential unauthorized disclosure to the Chair of the Operating Committee. Thus, the Commission believes that this modification will promote compliance with persons tasked with protecting the confidentiality of Plan-related information and, to the extent it results in unauthorized disclosures being found and disclosed in the minutes, it will provide transparency into overall compliance with the policy.

IV. Commission Findings

For the reasons discussed throughout, the Commission finds that the proposed Amendment to the Plan, as modified by the Commission, is consistent with the requirements of the Act and the rules and regulations thereunder, and in particular, Section 11A of the Act[111] and Rule 608[112] thereunder in that it is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system.

Section 11A of the Act[113] sets forth Congress' finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to ensure the prompt, accurate, reliable and fair collection, processing, distribution, and publication of information with respect to quotations for and transactions in such securities and the fairness and usefulness of the form and content of such information. The Commission believes that the confidentiality policy, as modified, furthers these goals set forth by Congress.

V. Conclusion

It is therefore ordered, pursuant to Section 11A of the Act,[114] and the rules thereunder, that the proposed Amendment to the Nasdaq/UTP Plan (File No. S7–24–89), as modified by the Commission, is approved.

By the Commission.

J. Matthew DeLesDernier,

Assistant Secretary.

Exhibit A

Marked To Show Changes From the Proposal

The Commission's additions are *italicized;* deletions are [bracketed].

UTP Confidentiality Policy

1. Purpose and Scope

a. The purpose of this Confidentiality Policy (the ''Policy'') is to provide guidance to the Operating and Advisory Committees of the UTP Plan (the ''Plan''), and all Subcommittees thereof, regarding the confidentiality of any data or information (in physical or electronic form) generated, accessed or transmitted to the Operating Committee, as well as discussions occurring at a meeting of the Operating Committee or any Subcommittee.

b. This Policy applies to all representatives of the Participants, Pending Participants, and the UTP Administrator and Processor (''Administrator and Processor''); *affiliates, employees, and* agents of the Operating Committee, *a Participant, a Pending Participant, the Administrator, and the Processor,* including, but not limited to, attorneys, *auditors,* advisors, accountants, contractors or subcontractors (''Agents''); any third parties invited to attend meetings of the Operating Committee or Plan subcommittees; and all members of the Advisory Committee *and their employers* (collectively, ''Covered Persons''). Covered Persons do not include staff of the Securities and Exchange Commission (''SEC''). All Covered Persons must adhere to the principles set out in this Policy *and all Covered Persons that are natural persons may not receive Plan data and information until they affirm in writing that they have read this Policy and undertake to abide by its terms.*

c. *Covered Persons* [The Administrator and Processor]may not disclose Restricted, Highly Confidential, or Confidential information except as consistent with this Policy and directed by the Operating Committee.

d. The Administrator and Processor will establish written confidential information policies that provide for the protection of information under their control *and the control of their Agents, including policies and procedures that provide systemic controls for classifying, declassifying, redacting, aggregating, anonymizing, and safeguarding information,* that is in addition to, and not less than, the protection afforded herein. Such policies will be *reviewed and approved by the Operating Committee, publicly posted, and* made available to the Operating Committee for review *and approval* every two years *thereafter* or when changes are made, whichever is sooner.

e. Information will be classified solely based on its content.

2. Definitions

a. ''Restricted Information'' is highly sensitive customer-specific financial information, customer-specific audit information, other customer financial information, and Personal Identifiable Information (''PII'').

b. ''Highly Confidential Information'' is[: (i) any data or information shared in an Executive Session or that would otherwise qualify for confidential treatment pursuant to the Plan's Executive Session Policy; and (ii)]any [other]highly sensitive Participant-specific, customer-specific, individual-specific, or otherwise sensitive information relating to the Operating Committee, Participants, or customers that is not otherwise Restricted Information. Highly Confidential Information includes: A Participant's contract negotiations with the Processor or Administrator; personnel matters; information concerning the intellectual property of Participants or customers; and any document subject to the Attorney-Client Privilege or Work Product Doctrine.

c. ''Confidential Information'' is, *except to the extent covered by (a), (b), or (d):* (i) any non-public data or information designated as Confidential by a majority vote of the Operating Committee; (ii) any document generated by a Participant or Advisor and designated by that Participant or Advisor as Confidential; *and* (iii) [the minutes of the Operating Committee or any subcommittee thereof unless approved by the Operating Committee for release to the public; and (iv)]the individual views and statements of

[110] This new provision supplements the proposed provisions that require self-reporting by a Covered Person in breach of the policy and the recording of such breaches in the minutes of the Operating Committee, neither of which the Commission is modifying. The Commission is modifying Section 3(d)(vi) to add the words ''self-reported'' to make it clear that the proposed provisions that require the name of the self-reporting Participant to be identified in the minutes do not apply to the Commission's modification that lets any person report such potential unauthorized disclosure to the Chair of the Operating Committee. The Operating Committee may, at its discretion, choose to put in place an appropriate process to review such reports of potential unauthorized disclosures.

[111] 15 U.S.C. 78k–1.

[112] 17 CFR 240.608.

[113] 15 U.S.C. 78k–1(c)(1)(B).

[114] 15 U.S.C. 78k–1.

Covered Persons and SEC staff disclosed during a meeting of the Operating Committee or any subcommittees thereunder.

d. ''Public Information'' is: (i) any information that is not either Restricted Information or Highly Confidential Information or that has not been designated as Confidential Information; (ii) any confidential information that has been approved by the Operating Committee for release to the public; [or](iii) *the duly approved minutes of the Operating Committee and any subcommittee thereof with detail sufficient to inform the public on matters under discussion and the views expressed thereon (without attribution); (iv) Plan subscriber and performance metrics; (v) Processor transmission metrics; and (vi)* any information that is otherwise publicly available*, except for information made public as a result of a violation of this Policy or any applicable law or regulation.* Public Information includes, but is not limited to, any topic discussed during a meeting of the Operating Committee, an outcome of a topic discussed, or a Final Decision of the Operating Committee, as defined below.

e. A ''Final Decision of the Operating Committee'' is an action or inaction of the Operating Committee as a result of the vote of the Operating Committee, but will not include the individual votes of a Participant.

f. The ''Operating Committee'' consists of the Participants, Pending Participants, Administrator and Processor, and designated Agents.

g. An ''Executive Session'' of the Operating Committee consists of the Participants, Administrator and Processor and designated Agents.

h. The ''Advisory Committee'' consists of any individual selected by the Operating Committee or a Plan Participant as an advisor to the Operating Committee.

i. The ''Legal Subcommittee'' of the Operating Committee consists of the Participants, Administrator and Processor and Legal Counsel.

3. Procedures

a. General

i. The Administrator and Processor will be the custodians of all documents discussed by the Operating Committee and will be responsible for maintaining the classification of such documents pursuant to this Policy.

ii. The Administrator may, under delegated authority, designate documents as Restricted, Highly Confidential, or Confidential, which will be determinative unless altered by a majority vote of the Operating Committee.

iii. *The* Administrator will ensure that all Restricted, Highly Confidential, or Confidential documents are properly labeled *and, if applicable, electronically safeguarded.*

iv. All contracts between the Operating Committee and its Agents shall require Operating Committee information to be treated as Confidential Information that may not be disclosed to third parties, except as necessary to effect the terms of the contract or as required by law, and shall incorporate the terms of this Policy, or terms that are substantially equivalent or more restrictive, into the contract.

b. Procedures Concerning Restricted Information

i. *Except as provided below, Covered Persons in possession of Restricted Information are prohibited from disclosing it to others, including Agents. This prohibition does not apply to disclosures to the staff of the SEC or as otherwise required by law, or to other Covered Persons as expressly provided for by this Policy.* Restricted Information will be kept in confidence by the Administrator and Processor and will not be disclosed to the Operating Committee or any subcommittee thereof, or during Executive Session, or the Advisory Committee, except as follows:

1. If the Administrator determines that it is appropriate to share a customer's financial information with the Operating Committee or a subcommittee thereof, the Administrator will first anonymize the information by redacting the customer's name and any other information that may lead to the identification of the customer.

2. The Administrator may disclose the identity of a customer that is the subject of Restricted Information in Executive Session only if the Administrator determines in good faith that it is necessary to disclose the customer's identity in order to obtain input or feedback from the Operating Committee or a subcommittee thereof about a matter of importance to the Plan. In such an event, the Administrator will change the designation of the information at issue from ''Restricted Information'' to ''Highly Confidential Information,'' and its use will be governed by the procedures for Highly Confidential Information in paragraph (c) below.

3. The Administrator may share Restricted Information related to any willful, reckless or grossly negligent conduct by a customer discovered by the Administrator with the UTP Administrator or with the *staff of the* SEC, as appropriate, upon majority vote of the Operating Committee in Executive Session, provided that, in any report by the Administrator during Executive Session related to such disclosure, the Administrator anonymizes the information related to the wrongdoing by removing the names of the party or parties involved, as well as any other information that may lead to the identification of such party or parties.

c. Procedures Concerning Highly Confidential Information

i. Disclosure of Highly Confidential Information:

1. *Except as provided below, Covered Persons in possession of Highly Confidential Information are prohibited from disclosing it to others, including Agents. This prohibition does not apply to disclosures to the staff of the SEC or as otherwise required by law, or to other Covered Persons authorized to receive it.* Highly Confidential Information may be disclosed only in Executive Session of the Operating Committee or to the Legal Subcommittee.

2. Highly Confidential Information may be disclosed to the staff of the SEC, unless it is protected by the Attorney-Client Privilege or the Work Product Doctrine. Any disclosure of Highly Confidential Information to the staff of the SEC will be accompanied by a FOIA Confidential Treatment request.

3. Apart from the foregoing, the Operating Committee has no power to authorize any other disclosure of Highly Confidential Information.

ii. In the event that a Covered Person is determined by a majority vote of the Operating Committee to have disclosed Highly Confidential Information, the Operating Committee will determine the appropriate remedy for the breach based on the facts and circumstances of the event. For the representatives of a Participant, remedies include a letter of complaint submitted to the SEC, which may be made public by the Operating Committee. For a member of the Advisory Committee, remedies include removal of that member from the Advisory Committee.

d. Procedures Concerning Confidential Information

i. Confidential Information may be disclosed to the Operating Committee, any subcommittee thereof, and the Advisory Committee. A Covered Person *may only disclose Confidential Information to other persons who need to receive such information to fulfill their responsibilities to the Plan. A Covered Person also may disclose Confidential Information to* [will not disclose Confidential Information to any individual that is not either a Covered

Person or a member of]the staff of the SEC, [except]*as authorized by* [with authorization of]the Operating Committee as described below, or as may be otherwise required by law.

ii. The Operating Committee or a subcommittee thereof may authorize the disclosure of Confidential Information by an affirmative vote of the number of members that represent a majority of the total number of members of the Operating Committee or subcommittee. Notwithstanding the foregoing, the Operating Committee will not authorize the disclosure of Confidential Information that is generated by a Participant or Advisor and designated by that Participant or Advisor as Confidential, unless such Participant or Advisor consents to the disclosure.

iii. Members of the Advisory Committee may be authorized by the Operating Committee to disclose particular Confidential Information *only in furtherance of the interests of the Plan,* to enable them to consult with industry representatives or technical experts, provided that the Member of the Advisory Committee takes any steps requested by the Operating Committee to prevent further dissemination of that Confidential Information, including providing the individual(s) consulted with a copy of this policy and requesting that person to maintain the confidentiality of such information in a manner consistent with this policy.

iv. A Covered Person that is a representative of a Participant may *be authorized by the Operating Committee to* disclose *particular* Confidential Information [and Highly Confidential Information]to other employees or agents of the Participant or its affiliates only *in furtherance of the interests of the Plan* as needed for such Covered Person to perform his or her function on behalf of the *Plan*[Participant, as reasonably determined by the Covered Person]. A copy of this policy will be made available to recipients of such information who are employees or agents of a Participant or its affiliates that are not Covered Persons, who will be required to abide by this policy.

v. A Covered Person may disclose their own individual views and statements that may otherwise be considered Confidential Information without obtaining authorization of the Operating Committee, provided that in so disclosing, the Covered Person is not disclosing the views or statements of any other Covered Person or Participant that are considered Confidential Information.

vi. *A person that has reason to believe that Confidential Information has been disclosed by another without the authorization of the Operating Committee or otherwise in a manner inconsistent with this Policy may report such potential unauthorized disclosure to the Chair of the Operating Committee. In addition, a* [A]Covered Person that discloses Confidential Information without the authorization of the Operating Committee will report such disclosure to the Chair of the Operating Committee. Such *self-reported* unauthorized disclosure of Confidential Information will be recorded in the minutes of the meeting of the Operating Committee and will contain: (a) The name(s) of the person(s) who disclosed such Confidential Information, and (b) a description of the Confidential Information disclosed. The name(s) of the person(s) who disclosed such Confidential Information will also be recorded in any publicly available summaries of Operating Committee minutes.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88828; File No. SR–MSRB–2020–02]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of a Proposed Rule Change To Align Certain MSRB Rules to Securities Exchange Act Rule 15l–1, Regulation Best Interest

May 6, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on May 1, 2020, the Municipal Securities Rulemaking Board (''MSRB'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the MSRB. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The MSRB filed with the Commission a proposed rule change consisting of amendments to MSRB Rule G–8, on books and records, MSRB Rule G–9, on preservation of records, MSRB Rule G–19, on suitability of recommendations and transactions, MSRB Rule G–20, on gifts, gratuities, non-cash compensation and expenses of issuance, MSRB Rule G–48, on transactions with Sophisticated Municipal Market Professionals (''SMMPs''), and the deletion of an interpretation of MSRB Rule G–20 (the ''proposed rule change''). The proposed rule change would align MSRB rules to the Commission's recently adopted Rule 15l–1 under the Exchange Act (''Regulation Best Interest'').[3]

The proposed rule change would result in the following changes to MSRB rules:

- MSRB Rule G–19 would apply only in circumstances in which Regulation Best Interest does not apply;
- MSRB Rule G–48 would make clear that the exception from the requirement to perform a customer-specific suitability analysis when making a recommendation to an SMMP, as defined in MSRB Rule D–15, is available only for recommendations that are subject to MSRB Rule G–19;
- MSRB Rule G–20 would require any permissible non-cash compensation to align with the requirements of Regulation Best Interest; and
- Dealers would be required to maintain books and records required by Regulation Best Interest and the related SEC Form CRS requirement.

The effective date of all of the amendments to MSRB rules included in the proposed rule change will be the compliance date for Regulation Best Interest.[4] Dealers would not have an obligation to comply with the proposed rule change until the effective date and the current versions of MSRB Rules G–8, G–9, G–19, G–20, and G–48 would remain applicable in the interim period between SEC approval and the effective date.

The text of the proposed rule change is available on the MSRB's website at *www.msrb.org/Rules-and-Interpretations/SEC-Filings/2020-Filings.aspx,* at the MSRB's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the MSRB included statements concerning the purpose of and basis for the proposed rule change and discussed any

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.15l–1; *see also* Exchange Act Release No. 86031 (June 5, 2019), 84 FR 33318 (July 12, 2019) (File No. S7–07–18) (''Regulation Best Interest Adopting Release'').

[4] *See* Regulation Best Interest Adopting Release, 84 FR 33400 (setting June 30, 2020 as the compliance date for Regulation Best Interest).